No. 78-1931

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES GYPSUM COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A10) and of the district court (Pet. App. A15-A18) are not reported. The prior opinions of this Court (Pet. App. A19-A75) and of the court of appeals (Pet. App. A76-A133) are reported respectively at 438 U.S. 422 and 550 F. 2d 115.

JURISDICTION

The judgment of the court of appeals (Pet. App. A11-A12) was entered on May 29, 1979. The petition for a writ of certiorari was filed on June 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence introduced at petitioners' previous trial was sufficient to support a verdict of guilty.

STATEMENT

On December 27, 1973, a federal grand jury sitting in the Western District of Pennsylvania indicted six manufacturers of gypsum board and various of their corporate officials for violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The indictment charged that the defendants, as part of a conspiracy that began prior to 1960 and continued until 1973, agreed to and did: (a) raise, fix, maintain and stabilize the prices of gypsum board; (b) fix, maintain and stabilize the terms and conditions of sale of gypsum board; and (c) adopt and maintain uniform methods of packaging and handling gypsum board.

At trial much of the evidence related to "verification," one of the thirteen types of activities alleged in the indictment to have been employed by petitioners "in formulating and effectuating" their conspiracy. Verification was a practice in which petitioners "telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom" (Pet. App. A22). Petitioners claimed that they engaged in verification solely for the purposes of complying with the Robinson-Patman Act and preventing customer fraud. The United States charged that the purpose and effect of verification were to stabilize prices for gypsum board. The jury, instructed by the district court that it could convict if it found either that defendants intended to fix prices or that their agreement had that effect, convicted all defendants.

On appeal the Third Circuit, although finding that there was evidence to support the government's position both that the defendants had intended to fix prices and that the conduct in question had continued until 1973 (Pet. App. A85-A86), nevertheless reversed and remanded

principally on the ground that a purpose to comply with the Robinson-Patman Act impliedly immunized defendants' conduct under Section 1 of the Sherman Act (*id.* at A84-A99). The court also held that various trial errors had occurred (*id.* at A99-A116).

This Court affirmed the judgment of the Third Circuit remanding the case for further proceedings. Although it rejected the court of appeals' ruling concerning the Robinson-Patman Act (Pet. App. A43-A55), the Court held that the jury instruction concerning intent was erroneous and that the government was required to prove the requisite intent by showing conduct undertaken either (a) with the purpose of stabilizing prices, or (b) with the knowledge that a stabilizing effect on prices was probable and with such an actual anticompetitive effect (*id.* at A40-A42).[1] Four days after it decided *Gypsum*, the Court denied a petition for certiorari by two National Gypsum Company executives who claimed that there was insufficient evidence of their participation within the period of the statute of limitations to implicate them in the price-fixing conspiracy. *Brown* v. *United States*, 438 U.S. 915 (1978).

After the case was remanded to the district court for a new trial in light of *Gypsum*, petitioners moved for judgment of acquittal on the ground that the first trial had produced insufficient evidence of their guilt and that a retrial would therefore violate the double jeopardy clause. The district court denied the motion, finding that the evidence was sufficient (Pet. App. A16).[2] On appeal

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[1] The Court also held that the district court had erroneously instructed the jury concerning withdrawal from the conspiracy (Pet. App. A59-A62) and had wrongly engaged in *ex parte* communication with the jury foreman (*id.* at A59).

[2] The district court also expressed reservations whether *Burks* v. *United States*, 437 U.S. 1 (1978), would bar a retrial where the evidence at the first trial is held to be insufficient because of a supervening development concerning the substantive law (Pet. App. A17).

from denial of the motion, the court of appeals, in an opinion by the same panel that had heard the original appeal, unanimously affirmed on the basis that there had been ample proof at the first trial of the formation of petitioners' price-fixing conspiracy, of the continuation of the conspiracy into the statutory period, and of all other elements of the offense charged (*id.* at A6-A10).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any court of appeals, and does not warrant further review.

Petitioners under three distinct headings actually present but a single issue: the sufficiency of the evidence at the first trial. As their lead counsel explained in opening his argument in the court of appeals, "The issue simply is the sufficiency of the evidence to support the defendants' convictions of conspiracy to raise, fix, maintain or stabilize prices during the period from December 27, 1968 to December 27, 1973."[3] This is a routine contention of factual error, and "review would be of no importance save to the litigants themselves." *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962). Review would be particularly unjustified here, for the district court and the court of appeals have both rejected petitioners' claims of insufficient evidence, and this Court itself has declined a prior invitation to examine the matter. Moreover, the lower courts were correct in sustaining the sufficiency of the evidence. That evidence, which is set forth at length in the government's brief on the merits in *Gypsum*, is summarized below.

1. Notwithstanding petitioners' contentions (Pet. 8-14), the courts below properly held that there was sufficient

[3]Transcript of Oral Argument, March 15, 1979, at 4.

evidence that petitioners engaged in verification for the purpose of stabilizing prices after December 27, 1968, the beginning of the applicable statute-of-limitations period.[4]

The trial record contains ample evidence directly demonstrating petitioners' illegal conduct during the statutory period. For example, A. L. Meyer of Georgia Pacific ("G-P"), who spent 27 years as a pricing official in the gypsum industry, actively engaged in the practice from as early as 1960 until his retirement in June 1969 (II A. 533-534).[5] Meyer acknowledged that the purpose of the price exchanges in which he engaged with each of the other corporate defendants was "to keep market stability" (II A. 545).[6] Burch, who succeeded Meyer at G-P, was indoctrinated in this practice by Meyer before Meyer's retirement (II A. 532-534; I A. 510). Burch acknowledged continuing to engage in verification until 1972 (I A. 504-505) because "[y]ou did not want to destroy your own market" (I A. 514).

[4]To the extent petitioners claim that the double jeopardy clause bars their retrial because of the insufficiency of the evidence at the first proceeding, see *Burks* v. *United States*, 437 U.S. 1 (1978), their position is, as demonstrated below, unavailing. To the extent petitioners claim that the court of appeals' decision is at variance with this Court's ruling in *Gypsum*, their argument is premature and not properly before the Court on review of the denial of the motion to dismiss on grounds of double jeopardy. Petitioners will have an adequate opportunity to raise the latter contention if and when they are convicted upon retrial. In any event, the decision of the court of appeals is fully consistent with *Gypsum*.

[5]As used in this Brief, the Appendix in the Supreme Court in the first *Gypsum* case is designated by "A." and is preceded by the volume number (in Roman numerals) and followed by the page number; the Brief for the United States on the merits in the first *Gypsum* case is designated as "United States Brief;" and the Appendix in the court of appeals in the first *Gypsum* appeal is designated by "ex" for exhibits and "C.A. App." for testimony.

[6]Sikes, an associate of Meyers at G-P from 1960 until 1967, confirmed that verification was to "save money" (II A. 587-588), and that, but for the practice, competition would "break a marketplace," the profits for the company would have been less, and the prices would have deteriorated (II A. 588-589).

Atwell of National Gypsum ("National") engaged in the practice from 1960 until at least January 1969. Although Atwell claimed that the discussions were for compliance with the Robinson-Patman Act (II A. 628-634), he admitted participating in verification in order to avoid "a deteriorated price situation in a region," and acknowledged that "price checking helped to prevent that type of thing" (II A. 659-660).

Jarrett, the general credit manager of Celotex, testified that his verification discussions occurred from 1965 to 1971, that these discussions dealt with competitive credit terms, and that his objective in the discussions was to avoid the added cost or the diminution of profits resulting from more liberal credit terms (II A. 825-826, 834-835).

United States Gypsum ("USG"), by formal authorization that lasted from 1962 until at least February 13, 1969,[7] allowed its pricing and credit officials to exchange competitive information with competitors expressly to avoid "consequences unfavorable to the company" (V A. 2651-2655), *i.e.*, the loss of profits resulting from market instability (I A. 339-340, 375-376, 377, 159-160). Seeking

[7]USG's verification in fact appears to have continued after February 13, 1969. The only document indicating any cessation by USG is a February 13, 1969 letter by USG's vice president, Watt, directing his subordinates to stop asking competitors about their prices and terms of sale "until the situation [created by this Court's decision in *United States* v. *Container Corporation*, 393 U.S. 333 (1969)] is clarified" (IV A. 2280). However, Thompson of Celotex testified that USG did not stop verifying with Celotex until December 1970 or December 1971 (III A. 1274), while Simpson of Republic quoted Watt as saying that USG would no longer exchange prices with Republic in "the 69-70 period" (I A. 270-271). In addition, during the statutory period USG also continued to use previously agreed-upon list prices, credit terms, and packaging and handling restrictions.

to avoid any "inference" of illegal activity, however, USG cautioned its officials not to keep any written records of competitor contacts (V A. 2651-2655).

This direct proof of petitioners' unlawful activity within the statutory period is also corroborated by the clear evidence of similar unlawful acts by petitioners in the pre-statutory period. For instance, Bear, a USG vice president in the early 1960s, testified that verification was employed for the "obvious purpose" of avoiding price deterioration by preventing competitors from undercutting each other (I A. 159-160). Gimlin, a USG vice president who succeeded Bear, admitted engaging in verification "so we wouldn't be over competitive on price" and recognized that verification had the effect of stabilizing prices (I A. 340, 375-378). Another USG pricing executive, Galvin, gave similar testimony (II A. 959-960).

In addition to this and other testimony, documentary evidence further established the anticompetitive purpose of the conspiracy in the pre-statutory period.[8] The verification discussions covered the entire scope of competitive activities in the market and helped to facilitate specific price agreements. One area in which petitioners used verification for anticompetitive purposes

[8]None of the petitioners kept systematic records of their verification activities, notwithstanding their contention that such contacts were made in order to comply with the Robinson-Patman Act (III A. 1459-1460, 1420; I A. 395, 428-429; II A. 628-634; III A. 1272, 1251-1252). As the Fourth Circuit recently observed, careful record keeping "would be the natural object of anyone genuinely concerned over Robinson-Patman violations." *Phillips* v. *Crown Central Petroleum Corp.*, No. 77-1780 (4th Cir. July 2, 1979), slip op. 14. Petitioners also took care to avoid keeping records of what they recognized were incriminating price discussions (IV A. 2362-2363; II A. 603-606, 542; I A. 409-414). And at least one petitioner, Celotex, when threatened with suit, destroyed as many of these documents as it could, despite a general document retention policy calling for their preservation (1698 ex, 1690 ex, 1691 ex).

was price protection, or a guarantee to a customer of a specified price for a prescribed duration (United States Brief 21-23, 36-37). In addition, the applicator allowance, a form of discount characterized by one of the conspirators as "vicious competition" (375 ex), was eliminated in an entire market area through petitioners' use of verification (V A. 2402-2405).[9] On another occasion, Atwell of National complained to McCaskill of G-P that G-P's Savannah Branch was "selling board out of warehouse at (only) $1.24/ MSF above dealer cost" and threatened to retaliate by opening warehouses and shipping by truck if G-P's prices were not increased (IV A. 2309, 2327; I A. 410-414). McCaskill quickly responded by increasing G-P's Savannah area prices and instructed a subordinate to convey the new prices to Atwell prior to internal publication (IV A. 2308; 763 ex).[10]

In addition to these areas of verification, the documentary evidence also showed that in the pre-statutory period petitioners policed deviations from uniform list prices and methods of delivery (111 ex, 112 ex; II A. 542-545; United States Brief 37-40), from price increases (V A. 2458; 361 ex-364 ex; IV A. 2400-2401; 324 ex), and from credit term

[9]McCaskill, one of the G-P executives who participated in these conversations, described them as a "very vivid example" of verification as practiced by petitioners (I A. 404-406).

[10]Moreover, within weeks McCaskill had secured approval of a new company-wide policy providing for a minimum 5% markup by all G-P branches (V A. 2555-2559; 1369 ex-1397 ex). McCaskill instituted this policy so that it would be "available for everyone involved" and would give "competition * * * a chance to objectively evaluate and calculate their next move while at the same time, resist the temptation to cut prices or install variable discounts to dealers" (V A. 2555-2559).

agreements (United States Brief at 40-42).[11] Contacts were made to gain assurances that sales would be made on the basis of list price only (V A. 2453; II A. 575-577; IV A. 2311; II A. 550-551). The assurances were achieved through policing calls involving as many as four companies (130 ex) and covering entire sales areas, and notes of such conversations were written in code by G-P executives (II A. 537-539, 575-578). When it appeared that USG was adopting new policies concerning delivery, McCaskill at G-P became disturbed and instructed his subordinate to contact USG to learn the facts and then to relay the information to National officials Atwell and John Brown (IV A. 2295; II A. 543-545). Similarly, when Kaiser was reported to have begun trucking in the Southeast, McCaskill issued directions "to discuss this [trucking] with the Boys in the market place & determine if we [G-P] should truck and where" (IV A. 2359); as a result of these instructions McCaskill's subordinate contacted Evans of USG (2750 ex), Atwell of National (IV A. 2363; II A. 542-543), and Miller of Celotex (2706 ex).

Petitioners (except for USG) concede that they engaged in verification during the statutory period (Pet. 6, 12, 13), and they do not challenge the sufficiency of the evidence of anticompetitive purpose for verification prior to

[11]The anticompetitive nature of these policing contacts is made clear by the fact that petitioners continued such discussions from December 1965 through 1967 even though during that period each was following their agreed-upon policy of selling only at list prices and not meeting single-plant competition. Since petitioners were not discounting while that policy was in effect, it was completely unnecessary for them to exchange information for the purpose of avoiding price discrimination charges.

December 27, 1968.[12] They argue, however, that as of that date the situation drastically changed and that thereafter their conduct must be viewed as benign because they then engaged in "vigorous price competition" and verified only to comply with the Robinson-Patman Act (Pet. 12-14). This argument is groundless. It is not only inconsistent with petitioners' representation to the court of appeals that the character of price verification was the same "in both the pre-statutory and the statutory periods alike,"[13] but it is also belied by the record. The evidence clearly demonstrated the existence of an anticompetitive purpose during the statutory period (see pages 5-7, *supra*). Moreover, none of the witnesses differentiated between the pre-statutory and statutory periods.[14] And petitioners' claim of a "price war" during the statutory period (Pet.

[12]USG alone argues that it did not engage in verification during the statutory period (Pet. 9-10). Since the company had a formal policy of verification in effect until at least February 1969 (IV A. 2280), and since the testimony of Thompson of Celotex and Simpson of Republic established USG verification well into the statutory period (see note 7, *supra*), the court of appeals correctly held that there was was sufficient evidence to support a verdict of guilty as to USG. Moreover, since there was sufficient evidence that USG continued to participate in the conspiracy during the statutory period, its contention (Pet. 14-16) that the government failed to prove that it did not withdraw from the conspiracy prior to the statutory period must be rejected as factually unfounded.

[13]Joint Brief for Appellants at 41, *United States* v. *United States Gypsum Co.*, Nos. 75-1836 *et seq.* (3d Cir.).

[14]Petitioners argue that their verification in the statutory period was pursuant to the advice of counsel to comply with the Robinson-Patman Act (Pet. 11, 13). This, however, is a twice-told tale: they advanced the same explanation for the pre-statutory period conduct. See also notes 8, 11, *supra*.

12-13) is unsupported by the trial record[15] and, in any event, cannot serve to legitimate verification in the statutory period because discounting and verification had begun prior to December 27, 1968 (Pet. 12-13), when there is ample evidence of anticompetitive purpose. In short, December 27, 1968 is simply irrelevant to the issue of verification. The evidence is all of a piece, and there is no basis to distinguish petitioners' purpose in verifying prior to the statutory period (when there is sufficient evidence of anticompetitive purpose, notwithstanding the claimed "price war") from that during the statutory period.

[15]Petitioners did not fight a general "price war" against each other. They did, however, engage in selective predatory price cutting directed at the single-plant producers while using verification to keep their own prices stabilized elsewhere. In December 1965, petitioners implemented new prices, and for more than two years thereafter they adhered to an agreed policy of not discounting and not meeting the competition of single-plant producers. During this time they continued to use verification as a means of policing their agreement. In 1968 the single-plant producers' market share had grown sufficiently to compel some responsive action. Petitioners' limited response was to discount only "on a selective basis" (1316 ex) in the prime market areas of the single-plant producers, particularly in the Southwest. Petitioners continued their own price exchanges and through them were able to maintain higher price levels in areas less susceptible to competition from single-plant producers. Thus petitioners' own data show, for example, that prices in the Washington, D.C. and Minneapolis markets were $11 to $13.50 higher than in the Dallas market from September 1968 to June 1970 (2238 ex, 2239 ex, 2235 ex, 2236 ex). In some areas, such as Pennsylvania, petitioners succeeded in raising prices during 1969 (C.A. App. 3683a). Petitioners' actual prices in 1969 directly paralleled those in 1965 when by their own analyses prices were "fairly stable" except where the single-plant producers "make the rate" (420 ex; V A. 2408), and it was not until 1970 that price levels in the aggregate dropped below those of 1965 (V A. 2743). As petitioners' own officials testified, verification did in fact stabilize prices (*e.g.*, I A. 340; II A. 660). Thus there was no "price war," and there is, as the government has consistently maintained, sufficient evidence of anticompetitive effects. Notwithstanding petitioners' assertion (Pet. 8), the court of appeals did not hold to the contrary (Pet. App. A10 n.4).

2. Petitioners also argue that the government charged a conspiracy with three objectives, presented sufficient proof at most of only one, and thus is barred by the double jeopardy clause from retrying petitioners (Pet. 17-23). This argument is without merit.[16] As the court of appeals found, the three allegedly distinct objectives of the conspiracy are not separate (Pet. App. A9). The court rightly observed that the objectives of stabilizing terms of sale and maintaining uniform methods of packaging and handling "are integral parts of the first" objective –to lessen price competition (*ibid.*).[17] Petitioners recognized this unitary nature when they accepted without objection the district court's instructions that the terms and conditions of sale are components of price and that fixing the methods of handling would not be illegal in this case except as part of a price stabilization agreement (*ibid.*).

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[16]Contrary to petitioners' suggestion (Pet. 18), the court of appeals did not rule that the government had failed to prove all three objectives of the conspiracy (Pet. App. A9). However, the court did expressly reject petitioners' argument that the government must prove all thirteen means alleged to carry out the conspiracy (*id.* at A8-A9). Petitioners do not seek review of that ruling in this Court.

[17]The evidence is clear that petitioners tightened credit terms in early 1966 as an integral part of their new pricing program begun in December 1965. See United States Brief at 31-35. Similarly, the agreed credit terms which continued during the period covered by the indictment were subject to policing through verification (*id.* at 40-42). Petitioners also consistently recognized that special packaging practices were the equivalent of price discounts and would, if granted, have to be met with a cash discount (1544 ex, 482 ex, 1581 ex; I A. 441).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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